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PHILOSOPHICAL UNDERPINNINGS OF THE FIRST AMENDMENT

*Charles Fried**

I am glad I came to the Commercial Speech Symposium and was allowed the occasion to reread Steve Shiffrin's work¹ and also become acquainted with the rather remarkable community that Loyola Law School represents.

I think it is really Ed Baker² whom I have to address here. I could not agree with him less. Like Ed³—and like some, but not all of you—liberty, to my mind, is the first virtue. And the reason that liberty is the first virtue could be connected to and derived from who we are; liberty is a basic responsibility to ourselves for what we make of our lives, the only lives we will ever have.

That liberty entails, first of all, the most important of liberties: liberty of the mind. Everything that comes into us, all the sensations, are judged by the mind. It is by the mind that we determine who we will be and what we will value. That is why liberty of the mind is the crucial liberty. That liberty is most closely connected to the fact that we are distinct individuals living the only lives we will ever have. From that, it is a very quick and necessary step to notice that we are not just minds; we are embodied minds, and therefore, from the liberty of the mind we come by a very short step to the liberty of the body and all the expressions of the body that entails. And that is

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1. See, e.g., STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* (1999); STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* (1990).

2. C. Edwin Baker, Nicholas F. Gallichio Professor of Law and Professor of Communication, University of Pennsylvania Law School.

3. See C. Edwin Baker, *Steve Shiffrin: Friend and Scholar*, 41 LOY. L.A. L. REV. 49 (2007) (discussing individual liberty, arguing that commercial speech should be denied First Amendment protection, and defending the merits of restricting media concentration).

why I thought finally, *finally* the Supreme Court spoke as a true libertarian organ in the *Lawrence*⁴ case.

But that is just a step along the way in the argument because—here is where my profound but respectful disagreement with Ed⁵ comes in—from mind to body to work is a series of very short, inevitable, and desperately important steps. Work is what we *do* with our bodies; it is one of the things we do with our bodies as we seek to live and as we interact with others. If somehow the liberty which we acknowledge in respect to our minds and bodies disappears—poof!—when we join the world of work, something really quite awful happens, because it is in the world of work that the most urgent manifestations of our minds and bodies take place. Now I have a more capacious view of work than Ed, and if you think about it, in the end you will come to agree with my view and not his. I view my term “work” to include what we are doing here today, the dinner that I am looking forward to tonight, the exchange I will have with the people who cooked that dinner, and the concert which I will enjoy tonight in the Walt Disney Concert Hall. Not to mention the beauties of this quadrangle⁶ that was produced by work, and that our being in it is a kind of work.

But I would include—and here is where the conversation gets a little X-rated, but I see no children—I would say that dancing and making love are work. They are the expenditure of mind and body to produce things with others. Now, Ed says, “Ah, yes, but there is a radical discontinuity between the . . .” well, I do not know quite where, but I am sure he would draw the line at making love. However, does what the Los Angeles Philharmonic will produce for me this evening fall (to use a phrase from Roberto Unger’s wonderful essay)⁷ on the Venetian or the Belmontian side? Belmont

4. *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that a Texas statute that placed a criminal prohibition on consensual homosexual sodomy between consenting adults unconstitutionally impinged on individual liberty interests protected by the Due Process Clause of the Fourteenth Amendment), *overruling* *Bowers v. Hardwick*, 478 U.S. 186 (1986).

5. See, e.g., C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in Nike*, 54 CASE W. RES. L. REV. 1161, 1163 (2004) (arguing that commercial entities are not “flesh and blood citizens” and are instead “instrumental creations that we bring into legal existence in order to serve our interests”).

6. Referring to the campus of Loyola Law School in downtown Los Angeles, California, designed by Pritzker-Prize-winning architect Frank O. Gehry.

7. Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 622–23 (1983) (referring to the contrast between the people of Venice and Belmont in

being the land of Ed Baker; Venice being the land of commerce. But really, is what happens at the philharmonic Venetian or Belmontian? Well, it is obviously both, and my conclusion from that is that Venice is, or can be, Belmontian. The reference in Roberto's work is to *The Merchant of Venice*⁸ and the land of Belmont is the terra firma, the beautiful suburb where all the merchants repair when the day's work is done.

And, to confuse you more, how about *not* the Los Angeles Philharmonic, which could scarcely operate as a pick-up operation, but a string quartet? That can be Venetian or Belmontian. I can sometimes actually pay people to play with me for some reason or another, or I do not have to. I do not see why it makes any difference whether they are paid or not. Ed says—in this rather antique, Marxist view which he is expressing—“Ah, when money's involved, it is an exchange of power.”⁹ Consider the sexual exchange. Is that an exchange of power? Well, yes, no, and maybe. Are we all dominated by power in our professional lives? Is it the case that we are all compelled to do that which will make us the most money? If so, I would say no one in this room would be doing what they are doing. Not one person. I certainly would not be.

We are free to earn the most money we can, to be beach bums, or anything in between, and what we do now is somewhere in between. Therefore, I do not see the market as this radical land of un-freedom while everything else from mind to body to collaborative, constructive enterprise—whether it is the string quartet or the lovemaking or whatever—is Belmontian. I think we all live in both places, and if we live in a decent society, a reasonably prosperous society, we can make our Venices as Belmontian as we choose; and indeed, all of us have chosen to make them rather Belmontian. If you compare the way we spend our days to the way that a master of the universe spends his at Goldman Sachs, you

William Shakespeare's *The Merchant of Venice*, and arguing that classical contract theory dichotomizes life into a sphere of commerce supervised by the government (Venetian) and a separate sphere of personal interactions unmotivated by commerce (Belmontian)).

8. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*.

9. See, e.g., Baker, *supra* note 3; KARL MARX, *ECONOMIC & PHILOSOPHICAL MANUSCRIPTS* (Martin Milligan trans., Progress Publishers 1959), available at <http://www.marxists.org/archive/marx/works/1844/manuscripts/preface.htm> (arguing that alienation of human work is the defining feature of capitalism and that individuals sell labor power for monetary compensation).

would see that we are exercising our freedom. We are free, but we are paid, and we are not as free as we would like to be. And that is because there are other people in the world.

So that is the general framework in which I view the question of commercial speech. There are many places, and I have learned some of them at this conference, where the freedom of the mind is not really implicated, and so be it. That is fine. But the tobacco companies making smoking seem attractive is really in the domain of freedom of the mind, and I do not see that there is even a coherent account of why, because it is a corporation, all of a sudden we have crossed the lagoon, and we are in Venice. What is a corporation after all? It is like a symphony orchestra, or a quartet, or a couple making love: a collection of people organizing their joint activities. It is nothing else, and I would not reify the corporation as being anything else. What proves my point is that if Philip Morris were a sole proprietorship, that would not change one whit our judgments for or against tobacco advertising, or whether there must be a label on cigarettes saying these things will kill you.

Well, I have put enough ideas before you. These ideas can be put forward in a more coherent and a more disciplined way. I have recently tried to do that,¹⁰ but I think I have introduced my ideas and invited you to think of a possible alternative to some of the premises which have been put forward as if they were axiomatic and self-demonstrating, but they are not. Indeed, not only are they not self-demonstrating, they are false.

10. See CHARLES FRIED, *MODERN LIBERTY AND THE LIMITS OF GOVERNMENT* (2006).